STATE OF MICHIGAN

IN THE SUPREME COURT

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Docket No. 122830

Plaintiffs/Appellants,

vs.

THE STATE OF MICHIGAN,

Defendant/Appellee,

And

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC, IV, and GAMING ENTERTAINMENT, LLC,

Intervening-Defendants-Appellees.
_____/

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BRIEF OF AMICUS CURIAE
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

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STATEMENT OF JURISDICTION

Amicus Curiae Sault Ste. Marie Tribe of Chippewa Indians does not contest the Supreme Court's jurisdiction in this case.

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STATEMENT OF QUESTION INVOLVED

I. Did the Michigan Legislature effectively approve the compacts at issue in this case when it passed a concurrent resolution rather than complying with Const 1963, art 4, §22 and passing a bill?

Plaintiffs-Appellants Answer: No.

Defendants-Appellees Answer: Yes.

Court of Appeals Answers: Yes.

Trial Court Answers: No.

Amicus Curiae Sault Ste. Marie Tribe of Chippewa Indians Answers: No.

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INTRODUCTION

Under the federal Indian Gaming Regulatory Act ("IGRA"), 25 USC 2701 *et seq.*, Indian tribes seeking to conduct gaming on tribal lands must negotiate a compact with the state in which the tribal land is located. At issue in this case is whether, in 1998, the Legislature effectively approved compacts between the State of Michigan and four Indian tribes concerning gaming when the Michigan Legislature passed 1998 House Concurrent Resolution 115 rather than passing a bill. According to Plaintiffs, whom Amicus Curiae Sault Ste. Marie Tribe of Chippewa Indians support, this concurrent resolution procedure did not satisfy the Enactment Clause, Const 1963, art 4, §22, and therefore failed to approve these compacts. Thus, the trial court properly granted summary disposition of this constitutional issue to Plaintiffs, and the Court of Appeals erroneously reversed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 1993, seven tribes, including the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe"), entered into compacts with the State of Michigan regarding gaming on tribal land pursuant to a consent judgment entered in federal court. See *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439, 443-444, 553 NW2d 7 (1996). A majority of the members serving in each house of the Michigan Legislature approved these 1993 compacts by adopting 1993 House Concurrent Resolution 439. See House Journal No. 75, p 2720-2721 (September 21, 1993); Senate Journal No. 76, p 2478-2479 (September 30, 1993). House Concurrent Resolution 439 did not mention the consent judgment that led to the 1993 compacts, but "[t]he legislative history . . . makes clear that the Legislature was aware of the terms of the agreement . . . ." *Tiger Stadium*, *supra* at 444. Subsequently, the People of the State of Michigan approved 1996 Initiated Law Proposal E to permit gaming. See references and annotations for MCL 432.201; see also Const 1963, art 2, §9. Pursuant to Proposal E, which was subsequently amended and became known as the Michigan Gaming Control and Revenue Act, Indian gaming on

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tribal land conducted pursuant to IGRA was excluded from its reach and was to be governed by IGRA and the compacts which were entered into in 1993.

In the late 1990s, the Little River Band of Ottawa Indians, the Pokagon Band of Ottawa Tribe (also described as the Pokagon Band of Potawatomi Indians), the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Potawatomi sought to obtain their own compacts with the State of Michigan similar to the compacts the other seven tribes negotiated in 1993. Accordingly, these four tribes negotiated gaming compacts with Michigan Governor John Engler. See *Taxpayers of Michigan Against Casinos v State*, 254 Mich App 23, 25, n 2, 657 NW2d 503 (2002). The compacts allowed:

> class III gaming by the tribes on eligible Indian lands in Michigan. The terms of the compacts contained various regulatory provisions. The tribes agreed to hiring criteria for their employees and management and agreed to provide benefits and disability compensation in conformance with Michigan law. The tribes also agreed to a minimum age requirement of eighteen years for participation in any class III game. The tribes adopted Michigan law regarding the sale and regulation of alcoholic beverages. Compact provisions addressed revenue payments to the state and to local governments and the creation of an oversight body to address the manner of distribution of revenues. However, the compacts did not provide the state with any authority to enforce the provisions of the compacts. Rather, they provided that representatives of the tribes and the state would meet to resolve any dispute regarding alleged noncompliance. If resolution could not be reached, the matter would be submitted to arbitration. *The compacts provided that the Governor would endorse the compacts and concurrence in that endorsement by the Michigan Legislature would occur by "resolution."* The governor had the ability to receive and agree to any amendments of the compacts. [*Id.* at 25-26 (emphasis added).]

In effect, the compacts did not require the Legislature to pass a bill, *i.e.*, enact a statute, to approve them.

In light of the Enactment Clause, Const 1963, art 4, §22, which states that "[a]ll legislation shall be by bill and may originate in either house," this approval process in the compacts concerned members of the Legislature. At the request of State Senator John D. Cherry, Jr. and State Representative Kirk A. Profit, Michigan Attorney General Frank J. Kelley prepared an opinion examining whether the Legislature had to approve the compacts to make them binding on the State of Michigan, and whether

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that legislative approval had to be in the form of a statute rather than a resolution. 1997 OAG 6960, p 1-2. At the bottom of the dispute was whether the compacts themselves were essentially legislation, requiring formal Legislative approval through the bill passage process.

To answer the question regarding the need for approval, the Attorney General first noted that IGRA required states to negotiate with tribes in good faith regarding gaming compacts, but did not specify a process by which a state may make a compact binding. *Id.* at 2. This left the question of approval to state law. *Id.* at 2.[1] In Michigan, as in other states, the Attorney General concluded that this approval process is largely legislative in character. *Id.* at 3. Indeed, were the Legislature not involved in approving a compact, then a question would arise concerning potential conflicts between the compact and existing, but contradictory, state law concerning gaming. *Id.* at 4. Further, many of the provisions in the compacts at issue in this case had a legislative quality, embracing subjects often addressed in legislation. *Id.* Accordingly, the Attorney General reasoned, the Legislature must approve the compacts. *Id.* at 5.

The Attorney General next examined Article 4 of the 1963 Constitution, which governs the Legislature, to determine the form of action the Legislature must take to approve the compact. *Id.* at 4. The Attorney General noted that the Constitution mandates that "[a]ll legislation shall be by bill," Const 1963, art 4, §22, and that there is a specific process by which a bill becomes a law, Const 1963, art 4, §26 and §33. 1997 OAG 6960, p 4. In particular, to become a law, a bill must have "the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, §26; 1997 OAG 6960, p 4. Case law had long established that a resolution that merely obtains the concurrence of a

[1] This is consistent with *Pueblo Santa Ana v Kelley*, 104 F3d 1546 (10th Cir, 1997), wherein the 10th Circuit recognized that, because IGRA is a federal statute, its interpretation implicates a federal question; however, the underlying question of whether a tribal-state compact is properly in effect is governed by whether it was properly adopted *under state law.*

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majority of members voting, as opposed to an actual majority of members serving in the Legislature, was not binding on anyone other than members of the Legislature. 1997 OAG 6960, p 5. Consequently, the Attorney General determined that the Legislature had to follow the process required to pass a bill so that it becomes a statute in order to provide the approval necessary to bind the State of Michigan to the compact. *Id.* at 6.

After issuing 1997 OAG 6960 on October 21, 1997, the Attorney General issued a clarification the very next day. The clarification stated:

> The conclusion could be easily drawn from a reading of the opinion [6960] that it also applies to all existing tribal-state gaming compact created under the Indian Gaming Regulatory Act. In fact, the opinion would have applied except that the preexisting seven tribal-state compacts now operating within the state were created as a result of a court order settling litigation on the subject. Where a matter is settled by federal court order and consented to by the parties, the matter is binding on all parties, including the state and tribal governments.
>
> Therefore the opinion [6960] issued yesterday does not invalidate the seven preexisting compacts. However, absent court intervention, the opinion does apply to all future gaming by tribal-state compacts entered into under the Indian Gaming Regulatory Act.
>
> The opinion [6960], therefore, should be interpreted as prospective and not retrospective.

Evidently, a majority of the members of the Legislature agreed with the Attorney General's opinion that they must approve the compacts in order to make them binding on the State of Michigan. Nevertheless, the Legislature proceeded to ignore the second element of the Attorney General's opinion, in which he asserted that approval must be given by statutory enactment. On December 10, 1998, the House of Representatives approved the compacts in House Concurrent Resolution 115 by a vote of 48 to 47. See House Journal No. 83, p 48-49 (December 10, 1998). On December 11, 2003, the Senate approved the compacts by adopting House Concurrent Resolution 115 by a vote of 19 to 18. See Senate Journal No. 76, p 4-5 (December 11, 1998).

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After the Michigan Legislature passed House Concurrent Resolution 115 ostensibly approving the compacts, Plaintiffs filed suit in Ingham Circuit Court alleging, among other things, that the resolution was ineffective to approve the compact because it was not a statutory enactment. The trial court had an opportunity to resolve this question when the parties, including the Intervening Defendants, filed cross-motions for summary disposition. The trial court reduced the parties' dispute to the simplest terms:

> The issue here is whether the compacts are legislation as opposed to contracts entered into by the State of Michigan. If the compacts are legislation, then the Michigan Constitution has been violated where the compacts were approved only through resolution does not require the same process and vote approval as a bill. If the compacts are contracts, and not legislation, then approval by resolution was appropriate." [Trial court opinion and order, 1/17/2000, p 5.]

In analyzing this issue, the trial court consulted the Attorney General's 1997 opinion and precedent from other states holding that compacts under IGRA are legislation. *Id.* at 5-6. The trial court, looking to the substance of the compacts instead of their form, noted the similarity between these compacts and the tribal-state compacts courts in other states had found to be legislation. *Id.* at 6-7, 9. The trial court recognized that Defendants had cited precedent holding that compacts are contracts, but distinguished those cases on the basis that they did not address whether they could be considered legislation. *Id.* at 7. The trial court also distinguished the two Michigan opinions that dealt with tribal-state gaming compacts, noting that neither case addressed whether the compacts were legislation requiring approval through statutory enactment. *Id.* at 7-8, discussing *Tiger Stadium*, *supra* and *McCartney v Attorney General*, 231 Mich App 722, 587 NW2d 824 (1998).

In the end, the trial court concluded that the compacts had all the hallmarks of legislation. Trial court opinion and order, 1/17/2000, p 9. In particular, the compacts permitted individuals eighteen years old and older to engage in gaming under the compacts, which was contrary to existing state law

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requiring individuals to be twenty-one years old before they could engage in gaming. *Id.* By approving House Concurrent Resolution 115, the Legislature was lowering the age at which it is lawful to engage in gaming in Michigan, removing an effective prohibition on gaming for people under age twenty-one, and therefore the Legislature was "acting on behalf of the citizens in determining the public policy of the State of Michigan." *Id.* at 11. The compacts also set in place an extensive regulatory scheme for the casinos created pursuant to the compacts, and provided for local governments to create revenue sharing boards. *Id.* at 11. Moreover, the trial court rejected Defendants' argument that a statutory enactment was unnecessary because federal law preempted state legislation related to Indian gaming. *Id.* at 10. To the contrary, the trial court determined IGRA did not preempt states from taking any and all action with respect to Indian gaming, but only the regulation of Indian gaming. *Id.* at 10-11. Because the policy embraced in House Concurrent Resolution 115 "affect[ed] all of the citizenry," the trial court concluded that it could "not be passed through resolution, but must be enacted as legislation." *Id.* Thus, the trial court granted Plaintiffs' motion for summary disposition, holding that House Concurrent Resolution 115 was legally ineffective in approving the compacts. *Id.* at 16.

When this case reached the Court of Appeals, the Court used a very different approach to determining whether that approval was necessary and whether the approval process had to be through statutory enactment. The Court first examined the Compact Clause in the United States Constitution, art I, §10, cl 3, and the way federal law has treated the need for Congressional approval of compacts. *Taxypayers*, *supra* at 31. According to the Court's research, "historically, congressional consent was not deemed essential to the validity of a compact" despite the usual pattern of submitting compacts to Congress for approval. *Id.* at 32-34. Instead, whether a federal compact required Congressional approval depended on if the compact shifted power to the states and away from the federal government and its supremacy. *Id.* at 34. In cases in which Congress did have to approve a compact, the Court

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found no evidence of "any uniform rules of procedure for congressional consent." *Id.* at 35, n 5. Thus, if Congress did not approve a compact, the pertinent analysis remained whether the "power structure" established in the compact diminished federal authority and provided the authority to actually do so. *Id.* at 35-36. When the Court of Appeals looked to Michigan case law, it found no "standards for passage of compacts or contracts," though both the *Tiger Stadium* and *McCartney* cases had referred to legislative approval in *dicta*. *Id.* at 36.

Turning to its substantive analysis, the Court of Appeals started with a well-settled proposition, namely, that the State of Michigan had a legal obligation to negotiate in good faith with the tribes seeking a gaming compact because Michigan regulates, but does not prohibit, gaming. *Taxpayers*, *supra* at 44-45, citing IGRA and *California v Cabazon Band of Mission Indians*, 480 US 202, 107 S Ct 1083, 94 L Ed 2d 244 (1987). Though the Court had expended a substantial effort in explaining how federal law looked to the effect a compact had on federal supremacy to determine whether Congress had to approve a federal compact, the Court did not use a similar analysis for this case. *Taxpayers*, *supra* at 45. For instance, the Court did not look at the substance of the compacts in this case to determine whether they tended to diminish the rights of the State of Michigan in favor of the rights of the tribes negotiating the compacts.

Rather, the Court proceeded to look directly at the language of IGRA. Looking to the text of the statutory provision concerning the Class III gaming at issue in the compact in this case, the Court quoted part of 25 USC 2710(d):

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are--
>
> (A) *authorized by an ordinance or resolution that--*
>
> (i) *is adopted by the governing body of the Indian tribe having jurisdiction over such lands*,

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(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect. [*Taxpayers*, *supra* at 45, quoting 25 USC 2710(d)(1) (emphasis added).]

For reasons not apparent from the text of the opinion, the Court seized upon the fact that 25 USC 2710(d)(1)(A) referred to "resolutions." *Id.* at 46. This provision unambiguously refers to resolutions "adopted by the governing body of *the Indian tribe* having jurisdiction over such lands" where the gaming would occur. 25 USC 2710(d)(1)(A)(i). (Emphasis added). Nevertheless, the Court interpreted this provision to mean that *states* may authorize compacts regarding gaming through ordinances and resolutions. *Taxpayers*, *supra* at 46. Because the Michigan Gaming Control and Revenue Act, MCL 432.203(5), recognizes that federal law preempts inconsistent state regulation of Indian gaming, the Court concluded that "the resolution process" referenced in IGRA "is a sufficient method for approval." *Taxpayers*, *supra* at 46. The Court commented that this less formal method of approval was consistent with the fact that Congress has not historically involved itself in approving every federal compact. *Id.* Apparently, the Court reasoned that if the Michigan Legislature did not have to approve the compacts at all, any less formal means it chose to express its approval was constitutionally adequate.

The Court also determined that it had alternate grounds to reverse the trial court on this issue. First, the compacts did not provide for enforcement, and therefore did not encroach on *Congress's* authority. *Id.* at 46-47. Second, drawing an implicit analogy between the compacts and a contract, the Court observed that the State of Michigan "routinely" approves contracts with resolutions. *Id.* at 47. Third, the Court noted that the Michigan Legislature had "a prior course of conduct, albeit unwritten, for approval of contracts." *Id.* at 47. In this instance, the Court was referring to the resolution that the

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Michigan Legislature had passed to approve 1993 gaming compacts with other tribes, which was the product of a consent judgment entered in federal district court. *Id.* Thus, the Court saw no reason to interfere with the process the Michigan Legislature had chosen for itself. *Id.* at 48.

STANDARD OF REVIEW

Appellate courts review de novo questions of constitutional law. See Mahaffey *v Attorney General*, 222 Mich App 325, 334, 564 NW2d 104 (1997).

I. THE MICHIGAN LEGISLATURE FAILED TO APPROVE THE COMPACTS AT ISSUE IN THIS CASE WHEN IT PASSED A CONCURRENT RESOLUTION RATHER THAN COMPLYING WITH CONST 1963, ART 4, §22 AND PASSING A BILL

In this instance, all seem to agree that the Michigan Legislature must approve the compacts. Whether that approval had to be in the form of a bill as mandated by Const 1963, art 4, §22 has been the heart of this case despite the other issues the parties raised and the lower courts decided. Both the Attorney General and the trial court adopted reasoned approaches to determine what form of approval was necessary to make the compacts effective. The Court of Appeals' decision in this case is a startling departure from that reasoned approach. Upon close examination, it is apparent that the Court of Appeals departed from the analysis the Attorney General and trial court used because of significant and obvious errors in its own reasoning. As the Sault Tribe explains, below, reversing the Court of Appeals and affirming the trial court is the proper result in this case because the compacts are legislation, and therefore the Michigan Legislature failed to abide by Const 1963, art 4, §22 when approving them by a resolution. Further, as the Attorney General indicated in the clarification of his 1997 opinion, holding that the resolution in this case was ineffective to approve the compact would not invalidate the 1993 compacts.

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A. The Michigan Constitution, Not The Federal Compact Clause, Provides The Proper Analytical Framework In This Case

The cardinal rule of constitutional construction holds that the judiciary's duty "is to ascertain the purpose and intent of the provision at issue." *Mahaffey*, *supra* at 334. "The clearest way to ascertain this meaning is to look at the text's 'natural, common, and most obvious meaning, strictly construed and limited to the objects fairly within its terms, as gathered both from the section of which it forms a part and a general purview of the whole context.'" *People v Antkoviak*, 242 Mich App 424, 436, 619 NW2d 18 (2000), quoting *Clearwater Twp v Kalkaska Co Bd of Supervisors*, 187 Mich 516, 525, 153 NW2d 824 (1915).

Like the Attorney General, the trial court demonstrated that it understood this principle when it began its analysis by examining the text of Const 1963, art 4, §22, framing the issues in light of whether the compacts were "legislation" within the meaning of §22, and consulting opinions interpreting and applying §22. Trial court opinion and order, p 4-6. The Court of Appeals, however, lost sight of the primacy of the Michigan Constitution when it began its analysis by examining compacts under federal law, including the Compact Clause, which does not have a parallel in the Michigan Constitution. *Taxpayers*, *supra* at 31-36. In fact, though the Court of Appeals did quote Const 1963, art 4, §22, it never expressly addressed whether the compacts were "legislation," or considered any of the cases interpreting and applying §22. *Taxpayers*, *supra* at 44. When both the Michigan and United States Constitutions include similar provisions, Michigan courts frequently follow federal constitutional precedent when interpreting the Michigan Constitution. See *Antkoviak*, *supra* at 436. However, Michigan courts are free to depart from federal precedent to give the Michigan Constitution its own meaning when there is a compelling reason to do so. *Id.* at 436-437.

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In this case, there is a compelling reason not to look to precedent interpreting the Compact Clause, US Const, art I, §10, cl 3, when interpreting the Enactment Clause, Const 1963, art 4, §22: these two constitutional provisions plainly bear no resemblance to each other to any degree. Compare *Antkoviak*, *supra* at 439, 463 (finding support to interpret the right to a jury trial in misdemeanor cases differently under the Michigan Constitution than under the similar federal constitutional provision); see also footnote 1 and *Pueblo of Santa Ana v Kelly*, 104 F3d 1546, 1557 (CA 10, 1997) ("State law must determine whether a state has validly bound itself to a compact."). The Compact Clause ensures that the states do not supplant the supremacy of the federal government without the consent of the representatives of the citizenry serving in the federal government, *i.e.*, the elected members of Congress. See US Const, art 6, cl 2. The Enactment Clause, Const 1963, art 4, §22, however, does not similarly attempt to ensure that the State of Michigan does not cede any of its lawful authority to Indian tribes without approval from the representatives of Michigan's citizens, *i.e.*, the elected members of the Michigan Legislature. Instead, Const 1963, art 4, §22, instructs the legislative branch of government in Michigan that it must create "legislation . . . by bill." It is no more complicated than that. Thus, as the trial court recognized, the resolution of this issue depends solely on whether the compacts are "legislation." If the compacts are legislation, they must be approved "by bill," because "that mode is the exclusive measure of the power of the legislature" to express "legislative will." *Becker v Detroit Savings Bank*, 269 Mich 432, 424-425, 257 NW2d 853 (1934) (interpreting Const 1908, art 5, §19, the precursor to Const 1963, art 4, §22 with identical language).

In *Blank v Dep't of Corrections*, 222 Mich App 385, 397-398, 564 NW2d 130 (1997*), affirmed by plurality* 462 Mich 103 (2000), the Court of Appeals determined that a joint committee of the Michigan Legislature could not "legislate" without following the procedures established in Article 4 of the 1963 Constitution, including the Enactment Clause in §22. Echoing the reasoning in *Becker*, *supra*,

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the Court in *Blank* relied on an opinion from Alaska holding that the Legislature must act by enactment to bind others. *Id.* at 394. This supported the *Blank* Court's conclusion that a "concurrent resolution does not have the force and effect of law," and therefore to make an action binding on others, the Legislature must follow the Enactment Clause. *Id.* at 399.

There are no Michigan opinions providing a detailed definition of "legislation" under the Enactment Clause. However, the *Blank* Court relied in part on *Immigration & Naturalization Service v Chadha*, 463 US 919, 103 S Ct 2764, 77 L Ed 2d 317 (1983), which provides some guidance in determining what constitutes "legislation." In *Chadha* the United States Supreme Court explained that "[w]hether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *Chadha*, *supra* at S Rep No 1335, 54th Cong, 2d Sess, 8 (1897).

In this case, as the trial court noted, the compacts must be considered legislation because they include matters of public policy, such as the minimum age at which it is legal to engage in gaming. Traditionally, public policy has been the exclusive province of the Michigan Legislature. See *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542, 273 NW2d 829 (1979) ("The responsibility for drawing lines in a society as complex as ours of identifying priorities, weighing the relevant considerations and choosing between competing alternatives is the Legislature's . . . ."). The compacts also provide extensive regulations related to the casinos established under the compacts. The compacts impose obligations on members of the tribes, apply state law to the sale and regulation of alcoholic beverages on tribal lands, provide for the payment by the tribe of certain monies to both the state and to local governments, impose various obligations on certain county treasurers, *and provide for the creation of certain local revenue sharing boards!* This sort of comprehensive regulation bears a striking resemblance to legislation passed through enactment. In persuasive *dicta*, the Court of Appeals

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in *Tiger Stadium*, *supra* at 455, n 5, suggested the tribal-state gaming compacts are legislation that require legislative approval. Other states have come to the conclusion that tribal-state gaming compacts are legislation, and therefore require the appropriate legislative enactment. See *McCartney*, *supra* at 727-728 and Kansas, New Mexico, and Rhode Island cases cited therein. Further, the Attorney General, whose opinions are considered persuasive by this Court, also concluded that these compacts are legislation. See *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 373, 604 NW2d 330 (2000) (Corrigan, J., concurring). Because it is clear that these compacts are legislation, it is equally clear that the Michigan Legislature failed to make those compacts binding by passing a bill as required in the Enactment Clause, Const 1963, art 4, §22. Therefore, the trial court correctly granted summary disposition of this issue to Plaintiffs and the Court of Appeals erred in reversing that decision.

B. Even If The Federal Compact Clause Did Provide The Proper Analytical Framework In This Case, That Framework Would Not Allow The Legislature To Use a Resolution To Approve These Compacts

Even assuming that the precedent interpreting the federal Compact Clause provided the correct analysis in this case, it is obvious that the Court of Appeals failed to apply that precedent correctly in this case. According to the Court of Appeals, and assuming that its research was accurate, a federal compact requires formal Congressional approval only if it tends to divert federal authority to the states. *Taxpayers*, *supra* at 35. To use that test by analogy in this case, the Court should have looked at whether these compacts tended to usurp the authority of the Michigan Legislature. However, the Court erroneously looked at the effect of these compacts on *Congress*, which is not implicated in this case. *Id.* at 46-47. Had the Court applied the test correctly, it would have seen that the compacts took from the Michigan Legislature the authority to make significant decisions, such as the minimum age for gaming and casino regulations. Under the Compact Clause analysis the Court articulated, this was enough to require legislative approval of these compacts.

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The Court only compounded this error by viewing the language in IGRA, 25 USC 2710(d)(1)(A), referring to resolutions approving of gaming as providing authority for *states* to pass resolutions to approve compacts. See *Taxpayers*, *supra* at 45. As the Court of Appeals suggested, IGRA's language is plain. But it is plain that this IGRA provision applies only to tribal resolutions, and not resolutions by state legislatures. After all, the very next line of the statute refers to the resolution being "adopted by the governing body of the *Indian tribe* . . . ." 25 USC 2710(d)(1)(A)(i). Even if the Court of Appeals had properly applied the Compact Clause analysis it articulated, it nevertheless would have failed to identify the proper form of approval required in this case. With all due respect to the Court of Appeals, the trial court correctly concluded that legislative approval was required, and therefore Const 1963, art 4, §22 required approval to be in the form of an enactment.

C. The 1993 Compacts

The Court of Appeals in this case appeared concerned that holding that a concurrent resolution was ineffective to approve a compact might invalidate the 1993 compacts with the other tribes. See *Taxpayers*, *supra* at 47, n 8. However, that would not be the case because there are several factors that distinguish the current compacts from the 1993 compacts.

First, as the Attorney General suggested, the 1993 compacts were entered into because of a federal consent judgment. This gives the 1993 compacts additional validity that these compacts do not have.

Second, House Concurrent Resolution 439 approving the 1993 compacts passed by wide margins of the members elected and serving in both houses of the Michigan Legislature. This suggested that the Michigan Legislature would have also approved the compacts by bill had that been the avenue chosen. In contrast, House Concurrent Resolution 115 seeking to approve these compacts passed by only one

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vote in both the House and Senate. With respect to the vote in the House of Representatives, fewer than half the 110 members elected and serving voted in favor of the resolution! This suggested that the legislators supporting approval of these compacts chose to obtain a resolution because they could not marshal the necessary votes to pass a bill. See Const 1963, art 4, §26 (requiring concurrence of majority of elected and serving members to pass a bill). In effect, the underlying problem with House Concurrent Resolution 115 may very well be that it was an intentional effort to deprive those members opposing the compacts of what would have been their opportunity to deny approval in the process required by Const 1963, art 4, §22.

Alternatively, because the Attorney General had issued his opinion regarding these compacts by the time the Michigan Legislature passed House Concurrent Resolution 115 in 1998, it is reasonable to infer that the Michigan Legislature knew that a resolution would not be binding. In other words, the Legislature purposefully chose to use a resolution because it did *not* want its approval to bind the State of Michigan. The Michigan Legislature that passed House Concurrent Resolution 439 to approve the 1993 compacts had not had this advice from the Attorney General, and therefore it is not possible to say that the Legislature purposefully chose a resolution to avoid making the 1993 compacts binding. More importantly, the Legislature was directed to approve the compacts by resolution by a federal court consent judgment resolving disputed litigation.

Third, and most importantly, the People of Michigan ratified the 1993 compacts by passing Proposal E. Effective December 5, 1996, Proposal E allowed casino gaming and ratified the then-existing compacts as governing Indian gaming under IGRA. Proposal E stated that the Act did not apply to a variety of gambling activities already lawful in Michigan, such as horse racing, bingo, lottery, millionaire parties. See historical notes following MCL 432.203, 1997 PA 69. Dispositively with respect to the 1993 compacts, Proposal E stated that it did not apply to:

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

> gambling on Native American land and land held in trust by the United States for a federally recognized Indian tribe on which gaming may be conducted under the Indian Gaming Regulatory Act . . . *which gaming shall be governed by IGRA and various tribal state compacts entered into by and between the State of Michigan and various Native American tribes*. [*Id.* (Emphasis added).]

This language acknowledged that the 1993 compacts existed and therefore approved them as valid by indicating that IGRA and those compacts would "govern" gaming on Indian land . Proposal E, as a voter-initiated referendum conducted under the process set-forth in Const 1963, art 2, §9, has the force and effect of a law equal to an enactment by the Michigan Legislature. See *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66, 340 NW2d 817 (1983) (Levin, J.).

Finally, it is worth noting that in *Santa Ana*, *supra* at 1556, the United States Court of Appeals for the Tenth Circuit recognized that parties to tribal-state gaming compacts have an interest in finality – to be free at some point from the threat of having the compacts invalidated. The *Santa Ana* Court, however, concluded that the mere months taken to challenge the compacts at issue in that case and in other cases had yet to present a situation in which finality was a significant issue. *Santa Ana*, *supra* at 1556. The tribes that entered into gaming compacts in 1993, ten years ago, are far beyond the point at which they should be required to take the risk that their compacts would be invalidated at some future time. Those original seven tribes have already established their gaming operations, invested in infrastructure and equipment, trained staff, and integrated the revenues from those operations into their ongoing fiscal plans. And they did so, unlike the 1998 compact signatories, without any suggestion pending that legislation was required to effectuate the compact. There has been no prompt dispute of the validity of the 1993 compacts on the basis of the manner of their approval. Whatever action this Court takes with respect to the 1998 compacts with these four tribes, finality weighs significantly against invalidating the 1993 compacts.

CONCLUSION

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

The trial court in this case correctly determined that the compacts at issue in this case are legislation that must be approved in accordance with the Enactment Clause, Const 1963, art 4, §22. Because the Michigan Legislature expressed its approval of these compacts through a concurrent resolution, and not by enactment, the compacts are ineffective. Nevertheless, this conclusion has no effect on compacts entered into by other tribes in 1993 because those compacts were the subject of a consent judgment, passed by a majority of the members elected to and serving in the Michigan Legislature, ratified by the People of the State of Michigan, and are entitled to finality. Therefore, the Sault Tribe respectfully asks that this Court reverse the Court of Appeals, affirm the trial court, and make clear in its opinion that the decision in this case does not affect the 1993 compacts.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
KEVIN J. MOODY (P34900)
JACLYN SHOSHANA LEVINE (P58938)

By: _____
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Dated: November 20, 2003

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

AMICUS SAULT TRIBE

APPENDIX A

Attorney General
Frank J. Kelley

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FOR IMMEDIATE RELEASE

October 22, 1997

Clarification

This is a clarification of Opinion No. 6960 issued yesterday by this office.

The conclusion could be easily drawn from a reading of the opinion that it also applies to all existing tribal-state gaming compacts created under the Indian Gaming Regulatory Act. In fact, the opinion would have applied except that the preexisting seven tribal-state compacts now operating within the state were created as a result of a court order settling litigation on the subject. Where a matter is settled by federal court order and consented to by the parties, the matter is binding on all parties, including the state and tribal governments.

Therefore, the opinion issued yesterday does not invalidate the seven preexisting compacts. However, absent court intervention, the opinion does apply to all future gaming by tribal-state compacts entered into under the Indian Gaming Regulatory Act.

The opinion, therefore, should be interpreted as prospective and not retrospective.

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

CONSTITUTIONAL LAW:	Necessity and extent of legislative approval of tribal-state gaming compacts
GAMBLING:	Necessity and extent of legislative approval of tribal-state gaming compacts
GOVERNOR:	Necessity and extent of legislative approval of tribal-state gaming compacts
INDIANS:	Necessity and extent of legislative approval of tribal-state gaming compacts
LEGISLATURE:	Necessity and extent of legislative approval of tribal-state gaming compacts

Under Const 1963, art 4, legislative approval is necessary in order for the State of Michigan to validly bind itself to a tribal-state gaming compact under the Indian Gaming Regulatory Act.

Under Const 1963, art 4, legislative approval of a tribal-state gaming compact under the Indian Gaming Regulatory Act requires a statutory enactment by the Michigan Legislature.

Opinion No. 6960

October 21, 1997

Honorable John D. Cherry, Jr.
State Senator
The Capitol
Lansing, MI

Honorable Kirk A. Profit
State Representative
The Capitol
Lansing, MI

You have asked whether legislative approval is necessary under Const 1963, art 4, in order for the State of Michigan to validly bind itself to a tribal-state compact

under the Indian Gaming Regulatory Act and, if so, whether such approval requires a statutory enactment by the Michigan Legislature.

Your inquiry was prompted by a series of proposed Indian gaming compacts recently negotiated by the Governor with several Michigan Indian tribes. Each of the proposed compacts contains a provision making its effectiveness contingent upon "[e]ndorsement by the Governor of the State and *concurrence in that endorsement by resolution of the Michigan Legislature*." (Emphasis added.) Your inquiry expresses concern as to whether a legislative joint resolution is sufficient for the state to validly bind itself to the proposed compacts.

.The Indian Gaming Regulatory Act, 25 USC 2701 *et seq* (IGRA), provides, *inter alia*, that if an Indian tribe wishes to conduct casino or similar gaming operations on Indian land, it must first attempt to negotiate a gaming compact with the state in which that land is located. Section 2710(d)(3)(A). If a compact is successfully negotiated with the state, it is then submitted to the United States Secretary of Interior for review and approval, and if approved, it is published in the Federal Register, and thereby "take[s] effect." Section 2710(d)(3)(B).

Although the IGRA is quite specific in mandating that, upon receipt of a tribal request to negotiate a gaming compact "the State *shall negotiate* with the Indian tribe in good faith to enter into such a compact," section 2710(d)(3)(A), the Act is silent on the question of what process must be followed by a state in order to effectively bind itself to such a compact. (Emphasis added.) In *Pueblo of Santa Ana v Kelly*, 104 F3d 1546 (CA 10, 1997), *cert den* ___ US ___; ___ S Ct ___; ___ L Ed 2d

___; 1997 US LEXIS 4578 (October 6, 1997), the court addressed this omission by Congress and concluded that it was deliberate.

> IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact. See *Washington v Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463, 493 & n. 39, 58 L Ed 2d 740, 99 S Ct 740 (1979) . . . We agree with the district court that IGRA's very silence on this point supports the view that "*Congress intended that state law determine the procedure for executing valid gaming compacts.*" *Pueblo of Santa Ana*, 932 F Supp at 1294.

104 F3d at 1557-1558 (emphasis added) (footnote omitted).

Therefore, the court concluded, one must look to state law to determine what process is necessary to effectively bind the state to the terms of a proposed gaming compact.

The same conclusion has been reached, either explicitly or implicitly, by the various state courts that have examined the issue of the validity of such compacts. See, e.g., *Kansas, ex rel Attorney General v Governor*, 251 Kan 559, 583; 836 P2d 1169 (1992); *Narragansett Indian Tribe of Rhode Island v Rhode Island*, 667 A2d 280, 282 (RI, 1995); *New Mexico ex rel Clark v Governor*, 120 NM 562, 571; 904 P2d 11 (1995). Each of these state cases, moreover, has concluded, as a matter of state constitutional law, that the approval by a state of a tribal-state gaming compact under the IGRA is legislative in character, thereby requiring the exercise by the state legislature of its formal law-making power.

An examination of the terms of the proposed compacts at issue compels a similar conclusion under Michigan law. A major purpose of the proposed compacts is to authorize the Indian tribes to conduct specific casino gaming activities which

would, absent the compacts, be in clear violation of several Michigan statutes. The proposed compacts further establish numerous requirements to be met in the management and operation of Indian gaming facilities, regulate the types and sources of gaming equipment that may be used, provide for arbitration of disputes that may arise under the compacts, subject the gaming operations to state liquor licensing and control laws, and commit the tribes to make semi-annual payments to the state and to local units of government. These provisions, purporting to be binding upon the state, are clearly legislative in character.

Pursuant to Const 1963, art 4, § 1, "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives." In order to protect the integrity of the legislative process, the People have, through the Constitution, imposed specific requirements upon the exercise of this power. Const 1963, art 4, § 22, requires that "[a]ll legislation shall be by bill and may originate in either house." Const 1963, art 4, § 26, requires that no bill shall become law without concurrence of a majority of the members of each house.

> No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house.

Finally, Const 1963, art 4, § 33, provides that "[e]very bill passed by the legislature shall be presented to the governor before it becomes law," and the governor must be afforded the opportunity to either approve or veto the bill.

In light of these provisions contained in Michigan's present Constitution, as well as in its predecessors, it has long been established law in Michigan that a mere

legislative resolution "is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it." *Becker v Detroit Savings Bank*, 269 Mich 432, 434-435: 257 NW 853 (1934), quoting with approval from *Mullan v State*, 114 Cal 578; 46 P 670 (1896). See also, *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935), and *United Ins Co v Attorney General*, 300 Mich 200, 205-206; 1 NW2d 510 (1942). This point was recently reiterated by the Michigan Court of Appeals in *Blank v Dep't of Corrections*, 222 Mich App 385, 396-397; 564 NW2d 130 (1997), where the court stated:

> In Michigan, Const 1963, art 4, § 1 provides that "the legislative power of the Sate of Michigan is vested in a senate and a house of representatives." Const 1963, art 4 §22 provides that "all legislation shall be by bill and may originate in either house." According to Const 1963, art 4, § 26, "no bill shall become a law without the concurrence of a majority of the members elected to and serving in each house." Then, pursuant to Const 1963, art 4, § 33, "every bill passed by the legislature shall be presented to the governor before it becomes a law. . . ." Even when the Legislature acts by concurrent resolution, it is not making "law". Such resolutions are not "bills," and are not presented to the Governor for approval as required by article 4 of our constitution.

It is my opinion, therefore, that under Const 1963, art 4, legislative approval is necessary in order for the State of Michigan to validly bind itself to a tribal-state gaming compact under the Indian Gaming Regulatory Act.

It is my further opinion that under Const 1963, art 4, legislative approval of a tribal-state gaming compact under the Indian Gaming Regulatory Act requires a statutory enactment by the Michigan Legislature.

FRANK J. KELLEY
Attorney General

AMICUS SAULT TRIBE

APPENDIX B

No. 83
STATE OF MICHIGAN

JOURNAL
OF THE
House of Representatives

89th Legislature
REGULAR SESSION OF 1998

House Chamber, Lansing, Thursday, December 10, 1998.

10:00 a.m.

The House was called to order by Acting Speaker DeHart.

The roll was called by the Clerk of the House of Representatives, who announced that a quorum was present.

Agee—present
Alley—present
Anthony—present
Baade—present
Baird—present
Bankes—present
Basham—present
Birkholz—present
Bobier—present
Bodem—present
Bogardus—present
Brackenridge—present
Brater—present
Brewer—present
Brown—present
Byl—present
Callahan—present
Cassis—present
Cherry—present
Ciaramitaro—present
Crissman—present
Cropsey—present
Curtis—present
Dalman—present
DeHart—present
DeVuyst—present
Dobb—present
Dobronski—present
Emerson—present
Fitzgerald—present
Frank—present
Freeman—present
Gagliardi—present
Galloway—present
Geiger—present
Gernaat—present
Gilmer—present
Gire—present
Godchaux—present
Goschka—present
Green—present
Griffin—present
Gubow—present
Gustafson—present
Hale—present
Hammerstrom—present
Hanley—present
Harder—present
Hertel—present
Horton—present
Jansen—present
Jelinek—present
Jellema—present
Johnson—present
Kaza—present
Kelly—present
Kilpatrick—present
Kukuk—present
LaForge—present
Law—present
Leland—present
LeTarte—present
Llewellyn—present
London—present
Lowe—present
Mans—present
Martinez—present
Mathieu—present
McBryde—present
McManus—present
McNutt—present
Middaugh—present
Middleton—present
Nye—present
Olshove—present
Owen—present
Oxender—present
Palamara—present
Parks—present
Perricone—present
Price—present
Profit—present
Prusi—present
Quarles—present
Raczkowski—present
Rhead—present
Richner—present
Rison—present
Rocca—present
Sanborn—present
Schauer—present
Schermesser—present
Schroer—present
Scott—e/d/s
Scranton—present
Sikkema—present
Stallworth—present
Tesanovich—present
Thomas—present
Varga—present
Vaughn—absent
Voorhees—present
Walberg—present
Wallace—present
Wetters—present
Whyman—present
Willard—present
Wojno—present

e/d/s = entered during session

Rep. LaForge, having reserved the right to explain his nay vote, made the following statement:

"Mr. Speaker and members of the House:

In my deepest respect for my friend Representative Ciaramitaro I must vote no on HB5989 (S7). Amendment #3 contained eight subsections. The following subsections are my reasons for voting no.

The amendment #4 to HB5989 (S-7) will only exacerbate urban sprawl. A township will only have to hire enough police officers to qualify for the '24-hour basis 7 days per week by personnel dedicated exclusively to the township.'

The amendment #5 to HB5989 (S7) will increase the proliferation and duplication of existing infrastructure by townships building and/or expanding water service to serve 50% of their residents.

The amendment #6 to HB5989(S7) will also encourage the proliferation and/or expansion of sewer service infrastructure by townships which will provide this service to 50% of their residents.

As an active member of the Urban Caucus and a representative of an older urban center, passage of HB5989 will slowly cause further deterioration to my city. Furthermore, the bill is not specific as to which jurisdiction provides these services to townships. Many townships across the state now receive water and sewer services from cities. Do these services, provided by cities by contract, qualify the townships for increased revenue sharing dollars? If they do, then monies formerly dedicated to cities will go to townships at the expense of cities."

Rep. Scott entered the House Chambers.

By unanimous consent the House returned to the order of

Reports of Standing Committees

The Speaker laid before the House

House Concurrent Resolution No. 115.

A concurrent resolution concurring in the tribal-state gaming compacts negotiated between the Governor and the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Band of Potawatomi.

(For text of resolution, see House Journal No. 78, p. 2405.)

(The resolution was reported by the Committee on House Oversight and Ethics on December 3, with amendments, consideration of which was postponed until December 8 under the rules; concurrent resolution postponed for the day on December 9, see House Journal No. 82, p. 2615.)

(For amendments, see House Journal No. 80, p. 2492.)

The question being on the adoption of the concurrent resolution,

The concurrent resolution was adopted, a majority of the members present voting therefor, by yeas and nays, as follows:

Roll Call No. 1143 **Yeas—48**

Anthony	Emerson	Hammerstrom	Olshove
Bankes	Fitzgerald	Harder	Owen
Basham	Frank	Hertel	Parks
Bobier	Freeman	Jellema	Price
Bodem	Gagliardi	Johnson	Rhead
Brewer	Geiger	LaForge	Richner
Brown	Gilmer	Llewellyn	Schauer
Ciaramitaro	Goschka	Mans	Scott
Curtis	Griffin	Martinez	Scranton
DeHart	Gubow	Mathieu	Stallworth
DeVuyst	Gustafson	McManus	Varga
Dobronski	Hale	Middleton	Wallace

Nays—47

Agee	Dobb	LeTarte	Sanborn
Baade	Galloway	Lowe	Schermesser
Baird	Gernaat	McBryde	Schroer
Birkholz	Green	McNutt	Sikkema
Brackenridge	Hanley	Middaugh	Tesanovich
Brater	Horton	Nye	Voorhees
Byl	Jansen	Oxender	Walberg
Callahan	Jelinek	Palamara	Wetters
Cassis	Kaza	Perricone	Whyman
Cherry	Kilpatrick	Profit	Willard
Cropsey	Law	Rison	Wojno
Dalman	Leland	Rocca	

In The Chair: DeHart

Rep. Thomas, under Rule 32(b), made the following statement:
"Mr. Speaker and members of the House:
I did not vote on Roll Call No. 1143 because of a possible conflict of interest."

Rep. Kaza, having reserved the right to explain his nay vote, made the following statement:
"Mr. Speaker and members of the House:
The resolution before us, negotiated by a legal representative of the governor of the state of Michigan, would permit the establishment of four additional gambling casinos operated by Native American tribes recognized by the federal government as legitimate.

It does not prevent the establishment of additional casinos operated by Indian tribes that may be recognized by the federal government as legitimate in the future. Nor does it provide for any form of local control. Lansing is once again abrogating its constitutional responsibility to the citizens of the state of Michigan, siding instead with an arrogant and power-hungry group of federal politicians whose interest is currying campaign contributions from special interests, not defense of the U.S. Constitution.

There is an even more compelling reason for opposing the resolution before us tonight in the wee hours of a lame-duck legislative system: the process.

The process, indeed the institution, is flawed for the following reasons:

* Michigan is one of only three states, according to the National Conference of State Legislatures, that does not require legislators to disclose their assets, debts and other financial information pertaining to net worth.

Other states maintain a higher ethical standard than Michigan because they recognized some time ago that financial disclosure reduces the possibility of conflict-of-interest. Financial disclosure creates a climate of good and open government yet it is stubbornly resisted in Michigan.

* The lame-duck session of any legislature creates the possibility of conflict-of-interest if legislators violate their constitutional oath by trading votes for remuneration such as jobs. Legislators, public choice economics suggests, are motivated not only by the economic self-interest of their constituents but first and foremost by their own economic self-interest. This economic behavior is more difficult for the public to interpret and understand in states that lack financial disclosure laws.

One need look no further than the manner in which the process handled this resolution to understand the motivation that led an overwhelming majority of Michigan residents to approve term limits in 1992.

Term limits is the powerful response of a public that holds an institution that refuses to reform itself accountable for its moral relativism."

Rep. Wetters asked and obtained a temporary excuse from today's session.

AMICUS SAULT TRIBE

APPENDIX C

No. 76

JOURNAL OF THE SENATE

Senate Chamber, Lansing, Friday, December 11, 1998.

12:01 a.m.

The Senate was called to order by the President, Lieutenant Governor Connie B. Binsfeld.

The roll was called by the Secretary of the Senate, who announced that a quorum was present.

Bennett—present
Berryman—present
Bouchard—present
Bullard—present
Byrum—present
Cherry—present
Cisky—present
Conroy—present
DeBeaussaert—present
DeGrow—present
Dingell—present
Dunaskiss—present
Emmons—present
Gast—present
Geake—present
Gougeon—present
Hart—present
Hoffman—present
Jaye—present
Koivisto—present
McManus—present
Miller—present
Murphy—present
North—present
O'Brien—present
Peters—present
Posthumus—present
Rogers—present
Schuette—present
Schwarz—present
Shugars—present
A. Smith—present
V. Smith—present
Steil—present
Stille—present
Van Regenmorter—present
Vaughn—present
Young—present

Senator Philip E. Hoffman of the 19th District offered the following invocation:
Deliver us from evil, for Thine is the kingdom, the power and the glory now and forever. Amen.

Senator Conroy entered the Senate Chamber.

By unanimous consent the Senate proceeded to the order of

Resolutions

By unanimous consent the Senate proceeded to consideration of the following concurrent resolution:

House Concurrent Resolution No. 115.

A concurrent resolution concurring in the tribal-state gaming compacts negotiated between the Governor and the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Band of Potawatomi and executed on December 3, 1998.

(This concurrent resolution was received from the House on December 10, rules suspended and yeas and nays ordered. See Senate Journal No. 75, p. 2241.)

The question being on the adoption of the concurrent resolution,

Senator Byrum moved that Senator V. Smith be temporarily excused from the balance of today's session.

The motion prevailed.

Senator Jaye offered the following amendments:

1. Amend the title, line 5, after "1998" by inserting a comma and "if certain conditions are met".
2. Amend the resolution, following the first Resolving clause, by inserting:

"Resolved, That we concur in these compacts only if the Native American tribes voluntarily agree that casino operators pay all business and personal property taxes, just as every other business owner and taxpayer does. Authority to operate these casinos shall expire when the Native American tribes have violated this condition as proved in a court of competent jurisdiction. The Legislative Auditor General shall perform annual studies to determine if the Native American tribes are complying with this condition. Any Michigan citizen shall have standing in Michigan court to bring charges of violations of this condition; and be it further".

The question being on the adoption of the amendments,

Senator Jaye moved that the amendments and the following amendments be considered en bloc.

The motion prevailed.

Senator Jaye offered the following amendments:

1. Amend the title, line 5, after "1998" by inserting a comma and "if certain conditions are met".
2. Amend the resolution, following the first Resolving clause, by inserting:

"Resolved, That we concur in these compacts only if the Native American tribes voluntarily agree that Native American reservations must comply with safety instructions and permitting in the construction and operation of residences, industrial zones, and commercial centers. Authority to operate these casinos shall expire when the Native American tribes have violated this condition as proved in a court of competent jurisdiction. The Legislative Auditor General shall perform annual studies to determine if the Native American tribes are complying with this condition. Any Michigan citizen shall have standing in Michigan court to bring charges of violations of this condition; and be it further".

Senator Jaye offered the following amendments:

1. Amend the title, line 5, after "1998" by inserting a comma and "if certain conditions are met".
2. Amend the resolution, following the first Resolving clause, by inserting:

"Resolved, That we concur in these compacts only if the Native American tribes voluntarily agree that guests, employees, and contractors have the same legal rights and remedies on Native American properties as they have on all other property. Authority to operate these casinos shall expire when the Native American tribes have violated this condition as proved in a court of competent jurisdiction. The Legislative Auditor General shall perform annual studies to determine if the Native American tribes are complying with this condition. Any Michigan citizen shall have standing in Michigan court to bring charges of violations of this condition; and be it further".

Senator Jaye offered the following amendments:

1. Amend the title, line 5, after "1998" by inserting a comma and "if certain conditions are met".
2. Amend the resolution, following the first Resolving clause, by inserting:

"Resolved, That we concur in these compacts only if the Native American tribes voluntarily agree that gill-net fishing in Michigan waters by Native Americans is prohibited. Authority to operate these casinos shall expire when the Native American tribes have violated this Legislative Auditor General shall perform annual studies to determine if the

Native American tribes are complying with this condition. Any Michigan citizen shall have standing in Michigan court to bring charges of violations of this condition; and be it further".

The question being on the adoption of the amendments,

Senator Jaye requested the yeas and nays.

The yeas and nays were not ordered, 1/5 of the members present not voting therefor.

The amendments were not adopted.

Senator Schuette requested the yeas and nays.

The yeas and nays were ordered, 1/5 of the members present voting therefor.

Senators V. Smith, Schwarz and Dunaskiss entered the Senate Chamber.

The amendments were not adopted, a majority of the members not voting therefor, as follows:

Roll Call No. 952

Yeas—16

Berryman	Dunaskiss	Jaye	Rogers
Cherry	Gougeon	Koivisto	Schuette
DeBeaussaert	Hart	Miller	Shugars
Dingell	Hoffman	Peters	Stille

Nays—22

Bennett	DeGrow	North	Smith, V.
Bouchard	Emmons	O'Brien	Steil
Bullard	Gast	Posthumus	Van Regenmorter
Byrum	Geake	Schwarz	Vaughn
Cisky	McManus	Smith, A.	Young
Conroy	Murphy		

Excused—0

Not Voting—0

In The Chair: President

Protest

Senator Bouchard, under his constitutional right of protest (Art. 4, Sec. 18), protested against the adoption of the amendments offered by Senator Jaye to House Concurrent Resolution 115.

Senator Bouchard's statement is as follows:

I voted "no" on the preceding amendments. I believe they were not something within the scope of purview or authority of this body. We are here to ratify or reject the contract relationship that was negotiated by our Governor. There are not 148 members that are negotiating the individual provisions of that and secondarily, through actions of this body, I think were precluded from imposing conditions that very clearly the federal government, through a variety of provisions, does not allow us to have that scope or authority. Therefore, even though some of the provisions may have been attractive, they are not something within our authority. For those reasons, to follow the scope of the law and the actual letter of the law, I voted "no."

Senator Rogers offered the following amendments:

1. Amend the title, line 5, after "Potawatomi" by inserting "if certain conditions are met".
2. Amend the resolution, following the first Resolving clause by inserting:

"Resolved, That we concur in the four tribal gaming compacts with the requirement that all new casinos are subject to the same regulatory framework as the Detroit casinos; and be it further".

The question being on the adoption of the amendments,
Senator Rogers requested the yeas and nays.
The yeas and nays were ordered, 1/5 of the members present voting therefor.
The amendments were not adopted, a majority of the members not voting therefor, as follows:

Roll Call No. 953

Yeas—18

Berryman	Gougeon	Peters	Shugars
Cherry	Hart	Rogers	Smith, A.
Conroy	Hoffman	Schuette	Stille
DeBeaussaert	Jaye	Schwarz	Van Regenmorter
Dingell	Miller		

Nays—19

Bennett	DeGrow	McManus	Smith, V.
Bouchard	Dunaskiss	Murphy	Steil
Bullard	Emmons	North	Vaughn
Byrum	Gast	O'Brien	Young
Cisky	Geake	Posthumus	

Excused—0

Not Voting—1

Koivisto

In The Chair: President

Senator Byrum moved that Senator Koivisto be temporarily excused from the balance of today's session.
The motion prevailed.

Senator Berryman offered the following amendments:
1. Amend the title, line 5, after "1998" by inserting a comma and "if any casinos established through these compacts are prohibited from operating until after the Detroit casinos are licensed".
2. Amend the first Resolving clause, line 15, after "'"Potawatomi"'" by inserting a period and "No casino established through these compacts can open for business until after the Detroit casinos approved by the voters in the general election of 1996 are licensed".
The amendments were not adopted.

Senator Koivisto entered the Senate Chamber.

The question being on the adoption of the concurrent resolution,
The concurrent resolution was adopted, a majority of the members voting therefor, as follows:

Roll Call No. 954

Yeas—19

Bennett	Conroy	McManus	Schwarz
Berryman	Emmons	Murphy	Smith, V.
Bouchard	Gast	North	Vaughn
Bullard	Geake	O'Brien	Young
Cisky	Koivisto	Posthumus	

Nays—18

Cherry	Gougeon	Peters	Smith, A.
DeBeaussaert	Hart	Rogers	Steil
DeGrow	Hoffman	Schuette	Stille
Dingell	Jaye	Shugars	Van Regenmorter
Dunaskiss	Miller		

Excused—0

Not Voting—1

Byrum

In The Chair: President

Senator Schuette moved to reconsider the vote by which the concurrent resolution was adopted.
On which motion Senator Schuette requested the yeas and nays,
The yeas and nays were ordered, 1/5 of the members present voting therefor.
The motion prevailed, a majority of the members voting therefor, as follows:

Roll Call No. 955

Yeas—29

Bennett	Emmons	McManus	Schwarz
Bouchard	Geake	Miller	Shugars
Bullard	Gougeon	North	Smith, A.
Cisky	Hart	Peters	Steil
DeBeaussaert	Hoffman	Posthumus	Stille
DeGrow	Jaye	Rogers	Van Regenmorter
Dingell	Koivisto	Schuette	Vaughn
Dunaskiss			

Nays—4

Berryman	Cherry	Gast	Smith, V.

Excused—0

Not Voting—5

Byrum	Murphy	O'Brien	Young
Conroy			

In The Chair: President

The question being on the adoption of the concurrent resolution,
Senator Schuette requested the yeas and nays.
The yeas and nays were ordered, 1/5 of the members present voting therefor.
The concurrent resolution was adopted, a majority of the members voting therefor, as follows:

Roll Call No. 956

Yeas—21

Bennett	Cisky	Koivisto	Posthumus
Berryman	Conroy	McManus	Schwarz
Bouchard	Emmons	Murphy	Smith, V.
Bullard	Gast	North	Vaughn
Byrum	Geake	O'Brien	Young
Cherry			

Nays—17

DeBeaussaert	Hart	Peters	Smith, A.
DeGrow	Hoffman	Rogers	Steil
Dingell	Jaye	Schuette	Stille
Dunaskiss	Miller	Shugars	Van Regenmorter
Gougeon			

Excused—0

Not Voting—0

In The Chair: President

Protests

Senators A. Smith, Miller and Jaye, under their constitutional right of protest (Art. 4, Sec. 18), protested against the adoption of House Concurrent Resolution No. 115.

Senator A. Smith's statement is as follows:

I voted "no" on the resolution for casinos not because I disagreed with what Senator McManus and Senator Gast said about the economic opportunity that the casinos present, but because I believe that the compact that was written is no assurance for the City of Detroit that they will be protected from any incursion within that 150 mile radius. As I read and re-read the language of the compact, there is a loophole the size of a mountain through which any one of the original seven compacts can drive a train.

I do not think that the agreement, that Detroit would be protected, has any substance. I do believe that within the next few years the executive in Oakland County will create a land trust with one of the seven casinos that are in the original compacts. They will get an agreement from the other tribes to operate a casino in that area.

I do not think this was a well written compact. It is with great disappointment that I see it passed here in the Senate. For those reasons I voted "no."

Senator Miller's statement is as follows:

Madam President, we had a very, very intense day here and I just want to say that I voted no on House Concurrent Resolution 115. I heard the arguments on this resolution and I want to say that you know contraire to the way that some of the arguments were laid to support this resolution that I want to tell you that I've been in this body for 21 years and I hate to see some of the people like Senator Geake, my friend from Wayne County, and Senator O'Brien from Wayne County, the only two members who are leaving who came with me, Madam President, 21 years ago. Of all the pieces of legislation I've seen go through this body, this is my opinion, and I want to say that the reason why I voted "no" is because I think that the principals of the people of this state were washed out to high priced lobbyists, not to the Indians, not to the people who have voted for me time and time again, to help those people on the reservations, whether it be for education, whether it be for welfare, whether it be for humanitarian reasons, I have voted for their interests and I'll stand up and defend my rights and my reasons why I voted and I voted for the compact in 1994. But I voted against this compact today because it comes time that we say enough is a enough. Let

them take their Indian reservation casinos to Ohio, Indiana, Wisconsin. This is a state that's made a strong recovery—it's made a recovery on industry, it's made a recovery on Ma and Pa investments in this state, it's made a recovery because of the education in this state. I voted "no" on HCR 115 because I think it is time that we say no to continual exploitation of the people and say no to gambling. I just hope that all of these members who are here today remember next year, or the following year, when all those same, not the Indians, Madam President, high priced lobbyists, those bankers, and those brokers are all out there tugging, and calling, and pulling, they're going to be back here again, and it's going to be another test of principles versus power. You know I've been on the losing end of a lot of battles, but tonight was one that I think it will stay with me a long time because the brokers didn't lose here tonight, the power didn't lose here tonight—the people lost here tonight. And maybe I'm wrong, but I'll tell you when we start bending over and letting the lobbyists call the shots and call the interest in this body then so be it. But I just want to say that this problem didn't go away, and it will be back, you'll see more Indians here next year and the following year.

The ironic thing is that I had a place next to my district called Hazel Park Racetrack and there used to be a place in Livonia called Ladbroke Racetrack. For 50 years, Madam Governor, they supplied the gambling revenues to this state, by the millions. When they pulled their curtains down I never heard one person get up here at these microphones and say we need to help the horsemen in this state, we need to help the farmers, the grain salesmen, and everybody else, the thousands of people who worked at race tracks. Race tracks, were the sin, they were the place of evil in this state, and a lot of people wouldn't even go to a race track, but they supplied millions of dollars for all the programs we had. But now we have a new game in town called casinos. Next spring when all those farmers, and all those grain people, and all those hot walkers will be standing in line at the social services office because we couldn't lift the finger for them, because they didn't have the almighty lobbyist out here in the Galleries fighting to save those race tracks. Now we have a new game in town. Maybe I was wrong on this particular vote, but I'll tell you I have a good feeling that this vote it going to come back to haunt every member in this chamber, and when it does and when the next group of Indians is in the Gallery, I'm going to remind everyone here that this wasn't the "Last of the Mohicans" we saw here tonight.

Senator Jaye moved that the statements he made during the discussion of the amendments he offered be printed as his reasons for voting "no."

The motion prevailed.

Senator Jaye's first statement is as follows:

Madam Governor and Senate colleagues, these amendments have been passed out for several hours. The first amendment would require as a condition of receiving the privilege of casinos in Michigan that the Native American tribes would abide by the same fishing requirements, license fees, no gill netting like every other Michigan resident and visitor. It would require that casino operators pay all of the same business taxes like everyone else. Indian casinos don't pay any business tax, they don't pay any cigarette tax, liquor tax, property tax, income tax, personal property tax; these are multi-million dollar operations and all of their subsidiary operations, little gas stations, party stores, bowling centers, hotels, all of these operations are exempt. However, in Connecticut casinos do pay all of the taxes that any other business has. I want the Native Americans that prosper to be millionaires; however, they should pull their own weight and pay the same kind of business taxes as every other little business in the state of Michigan. The third amendment would require that all contractors, guests and employees of casinos have the same legal rights as everyone else does throughout the state of Michigan. If you are an employee and you work at an Indian casino, you don't have labor rights, you don't have the right to have the health department or the building inspector to come and make sure that the working environments are safe. If you are a small business woman and you make a contract for services or goods with the Native American tribes and they refuse to pay you, you go in front of the Tribal Council, you don't get to go in front of a District Court judge. If you are a visitor and you get food poison or if you get hurt, or if there's a fight, or some kind of dispute you go in front of the Tribal Council, you aren't even given the right to an attorney, if you can't afford one. I believe if you are going to be doing business in the state of Michigan you should afford the guests, the employees and the businesses the same rights and liberties that are enjoyed by every other Michigan resident and by Indians when they go off the reservation. Finally, this amendment requires that all the contracting follows the same safety requirements for the construction and operation of casinos, commercial zoning, and industrial zoning. Let's have the environmental inspectors, let's have the safety inspectors, let's have the health inspectors. In fact, in Mt. Pleasant the hotels were closed down because of a respiratory problem and the problem was because state and local inspectors were not there to make sure not only are the installations proper but that the operations are done in a prudent and scientific and helpful manner. There was even a parking structure that was condemned, condemned because of the jeopardy not only to the workers but to the visitors. So what my four amendments say combined, is that if you want to do business in the state of Michigan and make millions if not billions in profits, then you will abide by the same rules as every other business and you also afford the same protections, benefits, as every other business provides to residents and guests to the state of Michigan. I request your support on these amendments and ask for record roll call vote or division.

Senator Jaye's second statement is as follows:

Madam Governor, the compact does not have the Indians paying any sales tax, or cigarette tax, or liquor tax, or business tax, or property tax, or personally property tax, or gasoline tax, or any other tax, with the exemption of an 8 percent wager on the slot machines, no taxes on poker, no taxes on anything else, only an 8 percent on the slots. And as I read the bill analysis, if there's any other electronic kinds of gambling that's approved even that 8 percent will disappear. So if a future Legislature says were going to have video poker at bars for example then these four Indian tribes will join the other seventeen and pay an absolute zero taxes, zero taxes! We have the constitutional right as a co-equal branch of government under Michigan's Constitution to amend any proposal by the Governor and all these amendments have been carefully crafted by the Legislative Service Bureau to say that the Indians must voluntarily agree to these public policy items in exchange for the privilege of having an Indian casino. Let's do it right, let's say that along with your rights you've got some responsibility to be a good citizen, a good corporate citizen and pull your own weight and pay taxes like everyone else.

Senator Jaye's third statement is as follows:

We have nobody to blame but ourselves. Back at 10:30 p.m., there were 21 votes that would have effectively killed Indian casino gambling and then it was the Republicans in this State Senate who said, "Oh, no, let's reconsider that vote." It wasn't good enough that we won fair and square against the odds of a resolution which needs a simple majority instead of a statute that needs 20 votes. "Oh, no were going to be the nice guys. Oh, let's appear to be fair." It's just like I recall the time, watching as a youth the Olympic Games when we beat the Russians fair and square, but the referees said "Well, why don't we give the Russians a couple extra minutes?" and then low and behold the communists beat the American Olympic basketball team, and we did it to ourselves. We won three hours ago by effectively killing Indian casino gambling extension, but instead the Republicans caucused, and we said, "Well, let's try it again, let's respect our caucus, let's stick it to the tax payer and the working people, and that's exactly what happened. I know there was some conversations well you folks have wanted to end Indian casino gambling had some Democrats voting with you. Well, guess what the people who wanted to extend Indian casino gambling also had three Democrats on their side. This was power politics, politics above principal. There's very little wonder why people are so disgusted with politics. When even well meaning legislators say, "I know we won, but in order to feel good, we'll give the political leadership another chance even though the deck was stacked against us to begin with." Let the record show from this day forth that 21 votes stood in the way of an expansion of Indian casino gambling, Indian casinos that don't pay any sales tax, business tax, property tax, school tax, don't pay to the seniors, don't pay to the road taxes. We had the votes to stop it, and it was raw party politics that made us change our own votes. I'm just proud to say that for about two and a half hours we had the votes to stop it and it's the taxpayers that are going to pay not only year after year after year in the casinos, but in the extra appropriations for airports, extra jobs for legislators, extra goodies in their district and God knows how much more, but the cash registers are cha-chinging, and all those who voted to reconsider the postponement were the instruments for our own defeat. Nobody forced us to reconsider it, so those who complain and protest "Well, I did the right thing," you did not do the right thing by snatching defeat from the jaws of victory. And I hope you'll consider that in the future when you undo the right thing in order to allow the political evil thing to have a second chance to win when you've got the vampire with the wooden stake in it's heart, don't pull it out cause he'll come back and bite your taxpayers.

Senators Schuette and McManus asked and were granted unanimous consent to make statements and moved that the statements be printed in the Journal.

The motion prevailed.

Senator Schuette's first statement is as follows:

This is a significant time for me this evening, I'm convinced, and for every legislator as you make a decision on whether or not we will expand gambling in the state of Michigan.

This week is Pearl Harbor Week. December 7, 1941, was a day that the President said will live in infamy. I sincerely hope that this is not a week that will live in infamy. I sincerely hope that we turn down these compacts. Soon we will cast votes, and this isn't an issue about whose virtuous or not virtuous; whose good and not good; whose honorable or not honorable—it's not the issue for me. Matter of fact, I have extreme regard for the sponsor of this resolution and his advocates who take a different view than I.

But we should have a spirited debate and talk about this because I think this is a straight up, stand up policy issue about Michigan's future. If you vote "yes" for this compact, you're voting for more casinos and expanding gambling.

I think we should vote "no" for a number of reasons. First of all, the process in which we are engaging is blatantly unconstitutional. We are, in a free-spirited way, ignoring the recommendation of the Attorney General of the state of Michigan who says: "You must not approve new compacts by resolution form." We are ignoring the Michigan Constitution of 1963. It hasn't been reviewed by the House and Senate and signed by the Governor. We're doing it by resolution form, and we all know why. It took the House three days to get 47 votes. That means that democracy is not

at work, this is mockery of democracy by resolution form and ignoring the opinion of the Attorney General which is binding—its not well if you want to agree to it, fine, if you don't, don't. That's not what this is about. This is a non-constitutional approach.

Second, in Washington there is this great debate on language. There is this great debate on language here in Michigan. In Washington, it's the definition of "is," in Lansing, it's more is fewer. Voting for more casinos is fewer. It doesn't work that way: "More" or more. Saying "no" is no. Voting "yes" doesn't mean "no." If you vote on this, you are voting for more casinos. The point is, The federal government, the United States Supreme Court and Congress has disarmed the Department of the Interior, and if we vote "no" on these compacts, the Department of the Interior cannot place new casinos in Michigan. Let me repeat, the Seminole decision says: "You may not have new casinos placed by the Department of the Interior." Even the Governor, who I have great respect for, acknowledges the importance and significance of Seminole. New compacts are barred by Seminole, but we need to remember that the Seminole decision of the United State's Supreme Court was decided and rendered on March 27, 1996, and these new compacts were signed in January, 1997. The Seminole decision carries for these compacts and future compacts. Soon the casinos will come to your neighborhood. The Kalamazoo Gazette: "Casino Planned." Another one talked about in Vanderbilt. We'll see them in Howell and Hazel Park. I guess the point is, if we don't say no now, more will come to Michigan. This is a moment of decision for us to say: "Do you want more casinos or no?"

You cannot have selective application of United States Supreme Court decisions. It applies and starts the law afresh from that time—that's the system of laws we have. We talked about the casinos being deregulated, and you could drive a Mack truck through. IGRA requires that Indian tribes own land in trusts before compacts are ratified and approved. Maybe only one of the four has lands in trusts. We've never been timid in Michigan about taking on the federal government when we have air emissions from Gary and Milwaukee, we sue the federal government. We need to stand up and say "no," no more casinos. There's not a middle ground—you can't be well, I'm personally opposed to casinos, but. . .

Senator Schuette's second statement is as follows:

In my previous comments I talked about my opposition to these compacts because of the unconstitutionality provision, a resolution instead of a statue, and many of these tribal casinos don't own lands in trust under IGRA. There has been some discussion about "Boy, if we don't act, the feds will sue us." But we turned down compacts two years ago, and if they had the horsepower to sue us, they would have done so, and they haven't. That's because they don't have a case. So this threat of "If we don't act—they'll sue, and we will get worse casinos," is an empty threat because for the last couple of years we've turned down a compact, and we haven't seen lawsuits. No. The point is they don't have the horsepower to make this suit stick. Because why? Because of Seminole. That decision, March 27, 1996, has rewritten the law and the application of the federal-state relationships. It covers, since that day, compacts that have been inked since that time and ones in the future. That's why the Seminole decision carries today and gives the states independence to chart and craft their own destiny.

This whole debate actually makes me very sad because what we will see in Michigan, unfortunately, is more casinos than public universities. All the time we've been spending on slot machines ought to be spent on schools and how you can help poor kids in urban areas get better schools, safer schools, and smaller class sizes. Tax cuts, we just talk about. There will be trade legislation, transportation, and welfare reform, but what I really fear in terms of the transformation of Michigan and its legacy as we move into the 21st Century, is that we will have more casinos than any other state in America, except Nevada. That's not my vision and not my version of the Michigan of the future.

Senator McManus' first statement is as follows:

I rise to oppose the four amendments on two bases. The main basis is the fact that you can't amend the compact by amending the resolution. All we're voting on here tonight is a resolution to approve the compact that was arranged between the Governor and the tribes, and putting amendments on this resolution does absolutely nothing. It's ineffective, and it would not take effect until agreed to by the Governor and the tribes. So I would ask us to turn down the amendments.

Now, secondly, I would point out that there's been much inaccurate information provided. Under the compacts, there will be state audits, the State Police will have access to our casino facilities, there are requirements that casinos abide by state labor laws, and lots of other regulations. So I would suggest, first, read the compact before we start making statements about it.

But that's not the important point. The important point is, these are ineffective and accomplish nothing, so I would ask we turn them down.

Senator McManus' second statement is as follows:

If the Governor wanted us to do it in this compact, he would have said so. He said we ought to get at it by legislation in the next session. Now if he wanted it down by amending this resolution, he would have indicated that, so I don't think that the comments hold water.

Senator McManus' third statement is as follows:

Let me say that when we started out this conversation, we were discussing an amendment. What the good Senator proposed, is on your desk, so this is a question again of whether we're doing an amendment to a resolution and trying to amend a compact in the process. It's not possible to do that. It's ineffective. We have the same argument with this resolution amendment that we did with the previous four, so I would urge that we turn it down.

But secondly, in the Michigan gaming law that we just got through with here a short time ago, we have in that gaming law already the fact that if the federal government, either by court action or by statute, allows us to do so, then automatically all of the Detroit gaming resolutions are into effect. So the whole question is, would the feds allow it or not allow it? If they do, we've already got it, and it's completely ineffective to put it on this resolution. I would ask that we turn it down.

Senator McManus' fourth statement is as follows:

I hate to sound repetitious, but again I'll have to repeat that this amendment is an attempt to amend the compact by amending the resolution. It is not possible to do that. Anything in the compact has to be agreed to between the tribes and the governor. We're not involved in that process. We have the option here to approve or disapprove the resolution. So, this is ineffective and I would urge us to turn it down.

Senator McManus' fifth statement is as follows:

I would like to ask for a "yes" vote on the resolution. Voting "no" will not stop casinos from coming into Michigan, and the Seminole decision in Florida will not stop the Michigan Indians from going to the federal district attorney and having him sue on their part and getting their casinos from the federal government. The Seminole case decided that the Seminole Tribe could not sue the state of Florida, but it did not decide that the federal district attorney could not sue the state of Florida. The option exists for the Indians to go the federal district attorney and have the state sued because we have not bargained in good faith if we do not approve the contracts. We will not stop the proliferation of casinos by voting "no" on this resolution.

Secondly, I think we should all realize that the native Americans hold certain rights in the U.S. Constitution and I passed that out to you today. It boils down essentially to one short paragraph: "The federal government, when the Constitution was put together, which charged to regulate commerce with three deals, foreign nations, states, and Indian tribes." If you think back to when the Constitution was written, the Indian tribes owned most of the United States. There were only a few states in the East that constituted non-Indian land. They have that right.

Now, under the federal gaming legislation and backed up by the Constitution, a compact with the state is a privilege, it's not a right. We are given a privilege to enter into a compact with the tribes to have some control and some authority over Indian casinos. In this one, each tribe will be limited to one casino, the state will receive eight percent of the profits, the state will be allowed to audit the Indian's books, the State Police will have access to casino facilities, there will be requirements that casinos abide by state labor laws and other regulations. Those things will not be necessary if the federal government approves the casinos with the Indians and we don't do it by state compact.

I come from the standpoint that if you're interested in limiting the number of casinos, you should vote for this resolution, not against it, because those casinos will be coming and there is opportunity for many more than are provided in the compacts.

Now, I would like to respond just a little bit to the rather disparaging remarks that have been made about the whole casino business. The history of the United States is fill with atrocities against the American Indian. You don't have to read much history to find out that we really didn't treat them all that well. I have a Tribe at Pshawabatee Town, I've grown up with those people and I know what it was like before casino B.C.—no money, no clothes, old cars, houses without paint, etc. I know how it is after casinos. They now have jobs, they've got money in their pockets, they have a new pickup, they may not have a new car, they are able to buy clothes, they've got schools, they've got health facilities and so on. There's been talk here about kids. What about the Indian kids? Aren't we interested in them too? Who speaks for the Indian in this chamber? We have not had a problem with prostitution, for heavens sakes, and we haven't had other legal problems either. I just want to say that I think it would be wise for this body to endorse these compacts tonight and get it done. I think not to do so is irresponsible.

Senator McManus' sixth statement is as follows:

In my district, I have two Indian tribes. I have the Phabawette town Indians and I have the Little River Manistee. I don't know how many of them voted for me, I never asked them. But I know one thing, when I'm elected Senator of the 36th District, I represent all of the people in the 36th District. In this particular case, I have a tribe in Manistee who are looking forward to a tourist attraction with winter snowmobiling, cross-country skiing, family entertainment tied in with a casino. And that's important to them, and it's important to people of Manistee. The city government of Manistee has a resolution in support of the tribe and the county of Manistee has a resolution in support of the tribe. The local folks there endorse it. Now, there is some opposition. You can certainly find it. But once in a while we get

into opposition in a lot of issues we get into around here. I believe our job is to represent all the people and not just some of the people.

Secondly, it's kind of interesting because the Indian tribe in my district that's been operating casinos for quite a while, has endorsed the Indian tribe in Manistee, a separate tribe, to put in a casino. They haven't fought it. Now the Sioux Tribe apparently has. But we have a working relationship between the tribes in my district, and they both support the casino.

Now, if we want to change the law on IGRA, the Indian Gaming Regulatory Act, the placed to do that is in Washington, D.C. We have in Washington two Senators from this state, and we have members of Congress, representatives from this state down in Washington. I there is somewhere about 16 of them. How many of them have voted against the Indian casinos. I think we probably had some that even voted for it. In fact, I think the Michigan congressional delegation is a pretty strong supporter. If you really want to do something about changing the rules, the place to do it is in Washington, D.C., not in Lansing, Michigan. The best we can do here is get the compact and get the deal made because that's as good as it's going to get. Failure of the State Legislature to approve the compacts negotiated between the four tribes and Governor Engler will be deemed a failure by the state to negotiate in good faith, and it's likely that the ultimate result in new and different compact prescribed by the Secretary of the Interior, or achieved through litigation brought by the United States on behalf of the tribes, and I'm reading a legal opinion which I concur with. The state will clearly lose existing tribal contributions to the renaissance fund upon licensing of Detroit casinos; the four proposed compacts embodied offers by the affected tribes to make payments regardless of Detroit licensing. Such payments will occur, however, only if the compacts are approved by the Legislature. We already know that we are going to lost the renaissance fund when the new Detroit casino is opened. Therefore, the best way to replace those funds is these compacts. With the four tribes under consideration, they've indicated they will do it. They publicly stated their intention to operate only one casino on their reservation lands.

However, if the compacts are approved another way, such as by the Secretary or in litigation brought by the United States, then the agreement that the tribe's gaming will be confined to one location on their tribal lands may be lost. That means to me that I could have a casino in Cadillac or in other parts of the district. And that tribe also has an interest south of my district into the district south. Secretarial procedures will almost certainly will also exclude any payments to the state. So, if we intend to limit casinos, and if we intend to receive the 8 percent, and work with our citizens, then we should move forward and approve this resolution tonight and get these compacts on the road.

By unanimous consent the Senate returned to the order of

Third Reading of Bills

The following bill was announced:

House Bill No. 6208, entitled

A bill to amend 1957 PA 261, entitled "Michigan legislative retirement system act," by amending sections 11, 17b, 21, 21a, 22, 22c, 23d, 26, 50a, 75, and 79 (MCL 38.1011, 38.1017b, 38.1021, 38.1021a, 38.1022, 38.1022c, 38.1023d, 38.1026, 38.1050a, 38.1075, and 38.1079), sections 21, 22, 23d, and 26 as amended by 1994 PA 359, section 11 as amended by 1988 PA 512, section 17b as amended and section 21a as added by 1987 PA 58, section 22c as amended and sections 75 and 79 as added by 1996 PA 486, and section 50a as amended by 1998 PA 80, and by adding sections 36a and 58a.

(This bill was read a third time on December 10 and consideration postponed. See Senate Journal No. 75, p. 2157.)

Senator V. Smith moved that Senator Peters be temporarily excused from the balance of today's session.

The motion prevailed.

The question being on the passage of the bill,

Senator McManus offered the following amendments:

1. Amend page 1, following "THE PEOPLE OF THE STATE OF MICHIGAN ENACT:" by inserting:

"Sec. 9. (1) "Salary" means the compensation, common to all legislators, exclusive of travel allowance, paid by the state for 1 year of service as a legislator. A member shall contribute to the retirement system based on the percentage applied to that salary.

(2) For purposes of section 23, salary also includes an additional 2% through December 30, 1986, and 4% beginning December 31, 1986, compounded annually and added for each year or major portion of a year that expires after the member terminates service and before the member retires, of the member's greatest salary determined pursuant to subsection (1) received in 1 calendar year. This subsection only applies to a member who first becomes a member on or before ~~December 1, 1994~~ JANUARY 1, 1995, and whose service terminates on or after December 1, 1978.

(3) For purposes of section 23, for a member who left service before December 1, 1978, salary also includes an additional 2% for each year beginning January 1, 1979 through December 30, 1986 and 4% beginning December 31, 1986, compounded annually and added for each year or major portion of a year that expires after the member

AMICUS SAULT TRIBE

APPENDIX D

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

GENERAL TRIAL DIVISION

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and LAURA BAIRD, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiffs,

v

STATE OF MICHIGAN,

Defendant,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, a Florida corporation, and GAMING ENTERTAINMENT (Michigan), LLC, A Delaware limited liability company,

Intervening Defendants.

OPINION AND ORDER

Hon. Peter D. Houk

Docket No.: 99-90195-CZ

This Court, having considered Cross Motions for Summary Disposition from all of the parties and the briefs in support thereof, and having heard oral arguments on December 3, 1999, issues the following Opinion and Order.

OPINION

INTRODUCTION

> The Legislature is the final arbiter of this state's public policy. The quintessential political judgment whether to alter the quality of our collective life in Michigan by legalizing casino gambling should occur in the political branch.[1]

Casino gambling is a highly regulated activity that has been considered a moral evil by the citizens of the State of Michigan for decades.[2] While it is not this Court's place to pass judgment on this public policy; this case involves just that - an issue of public policy. As such, it is for the people of this State, via their representatives in the Michigan Legislature, to determine the State's policy regarding gambling. Therefore, when the Legislature changes its longstanding policy regarding casino-style gambling, it must do so through the enactment of legislation and all of the procedures pertaining thereto.

FACTS

Plaintiffs in this case seek declaratory judgment that House Concurrent Resolution 115 (hereafter HCR 115) is violative of the Michigan Constitution. Four Indian tribes[3] located within the State of Michigan petitioned the State, as required by federal statute[4], to run casino-style

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[1] *Michigan Gaming Institute, Inc v State Bd of Education*, 211 Mich App 514, 522; 536 NW2d 289 (1995) (Corrigan, J., dissenting), rev'd 451 Mich 899; 547 NW2d 882 (1996).

[2] One must look no further than the City of Detroit to see that casino-style gambling is an issue of controversy in Michigan. Between 1976 and 1994, Detroit voters rejected five proposals to bring casinos into the city. It was not until 1996 that the voters finally approved Proposal E to allow casinos to open their doors. House Legislative Analysis, HB 4664, June 11, 1997.

[3] The compacts are between the State of Michigan and the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Band of Potawatomi Indians.

[4] The Federal Indian Gaming Regulatory Act (IGRA) permits casino-style gambling on Indian lands only if the tribe has entered into a valid State/Tribe compact approved by the State. 25 USC 2710(d)(1)(C).

gambling facilities on Indian lands. Governor Engler negotiated these compacts on behalf of the State of Michigan.[5] The compacts permit the Indian tribes to operate the gaming facilities, subject to many requirements including following certain State labor and liquor laws, requiring that a percentage of the revenues be paid to the State, and defining who may lawfully gamble at these facilities. These compacts also require the approval of the State Legislature by resolution before they become effective. The State Legislature approved these compacts through HCR 115, which passed in both Houses in December, 1998, by narrow margins.[6]

Plaintiffs bring this three-count complaint alleging that HCR 115 violates the Michigan Constitution because it is in fact "legislation" that was passed without approval of a majority of the members elected and serving in the House and Senate. Plaintiffs also allege that this resolution violates the Separation of Powers Clause contained in the Michigan Constitution because it grants to the executive branch law-making powers.

ANALYSIS

All of the parties, including the Intervening Defendants, have brought Motions for Summary Disposition. Defendant, State of Michigan, contends that Plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs bring their Motion arguing that there is no genuine issue of material fact and that Plaintiffs are entitled to judgment as a matter of law. Lastly, the Intervening Defendants bring a Motion for Summary Disposition claiming that the complaint fails to state a claim upon which relief can be granted, that Representative Baird should be dismissed for lack of

[5]These four compacts contain identical terms and will be discussed together throughout this Opinion.

[6]1998 Journal of the Senate 76 (December 11, 1998).

standing, and that the complaint should be dismissed for Plaintiff's failure to join indispensable parties - the four Indian tribes. The Defendant, State of Michigan, and the Intervening Defendants will collectively be referred to as "Defendants" throughout this Opinion and Order.

I. Standards of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. *Maiden* v *Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. The reviewing court should evaluate a motion under (C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Maiden*, *supra*.

II. Resolution v Bill

Counts I alleges that approval of these compacts should have been through legislation, and not resolution. Therefore, it is alleged that article IV, § 22 of the Michigan Constitution has been

violated. Article IV, § 22 provides that all legislation shall be by bill and may originate in either House. Plaintiffs contend that the compacts make policy decisions for the State and could only be passed by the Legislature after being presented as a bill.

Defendants respond that the compacts are nothing more than contracts between the State and the Indian tribes and as such, do not need to be enacted as a new law. Defendants claim that the compacts are not binding on the State, outside of the Legislature, where the rules established in the compacts are nothing more than agreements between the parties. Defendants argue that these agreements are not subject to enforcement by the State, other than a claim of breach of contract. Defendants also contend that the resolution is not contrary to public policy where Michigan has legalized many forms of gambling in the State and passed the Michigan Gaming Act, being MCL 432.201; MSA ___.

The issue here is whether the compacts are legislation as opposed to contracts entered into by the State of Michigan. If the compacts are legislation, then the Michigan Constitution has been violated where the compacts were approved only through resolution because approval by resolution does not require the same process and vote approval as a bill. If the compacts are contracts, and not legislation, then approval by resolution was appropriate.[7]

This issue is one of first impression in Michigan. The only on-point Michigan authority available is an Opinion of Attorney General, Frank J. Kelley, in which the Attorney General opines

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[7]Unlike the federal constitution, the Michigan Constitution is not a grant of authority to the Michigan Legislature, but rather a limitation. *In re Request for Advisory Opinion Enrolled Senate Bill* 558, 400 Mich 175; 254 NW2d 544 (1977). If the Michigan Constitution does not prohibit an act, it is permitted. Therefore, the Michigan Legislature has a general power to contract for the State of Michigan unless there is a limitation contained in the constitution. *Id.* There is no statute that limits the Legislature's authority to enter into compacts with Indian Tribes or any process required to enter into such compacts. Therefore, the only applicable constitutional limitation is the process required for the passage of a bill.

that State/Tribe gaming compacts are legislation.[8] The Attorney General first noted in his opinion that although the Federal Indian Gaming Regulatory Act (IGRA)[9] requires states to negotiate in good faith with Indian tribes for the establishment of the compacts, the Act is silent as to what process must be followed.[10] This silence has been interpreted as Congress' intent that it is State law that determines what process is required for the entering into the compacts.[11] The Attorney General then concluded that these compacts are legislation. He made this finding based upon the fact that Indian casinos would be in violation of State law without the compacts and because the compacts establish numerous requirements that must be met with regards to the operation of the casinos. These requirements would be binding upon the State and have the same force and effect of law, and therefore, are legislation.[12]

Plaintiffs also advocate that two other states, New Mexico and Kansas, have considered this issue and have concluded that the State/Tribe compacts are legislation. See *State* v *Johnson*, 120 NM 562; 904 P2d 11 (NM, 1995); *State* v *Finney*, 251 Kan 559; 836 P2d 1169 (Kan, 1992). These two cases, while instructive dealt with the broader issue of whether the governor of a state could

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[8] OAG, 1997, No 6960, p 159, (October 21, 1997)

[9] 25 USC 2701 *et seq*.

[10] 25 USC 2701(d)(3)(A).

[11] *Pueblo of Santa Ana* v *Kelly*, 104 F3d 1546 (CA 10, 1997).

[12] The Attorney General, in reaching this conclusion, relied on the case of *Becker* v *Detroit Savings Bank*, 269 Mich 432, 434-435; 257 NW 853 (1934) (holding that a resolution "is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.") This principle was reiterated in the case of *Blank* v *Dep't of Corrections*, 222 Mich App 385; 564 NW2d 130 (1997), where the Court of Appeals struck down a provision in the Michigan Administrative Procedures Act, MCL 24.201 *et seq*; MSA 3.560(101) *et seq*. that gave the Joint Committee on Administrative Rules the authority to veto administrative rules. The Court of Appeals relied, in part, on the holding of the Alaska Supreme Court that the legislature may act by resolution only in an advisory capacity, "but, when it [the Legislature] means to take action having the binding effect on those outside the legislature it may do so only by following the enactment procedures." *Id.* at 394 (Citing *State* v *ALIVE Voluntary*, 606 P2d 769, 773 (Alas, 1980)).

independently enter into a compact, rather than the issue of whether the compact constituted legislation. Both states, however, did find that the compacts at issue were new laws, and as such, could only be enacted by the state legislature. Both the New Mexico and Kansas compacts had requirements similar to those established in the compacts at issue. For example, the Kansas compact required the establishment of a state gaming agency and permitted the state government to run background investigations on employees of casinos. The New Mexico compact authorized forms of gambling that were illegal in that state. The Supreme Court for each state ultimately concluded that based on those factors, the compacts were policy choices that constituted new laws or the amendment of existing laws, thus were legislative functions.

Defendants cite the case of *Pueblo of Santa Ana* v *Kelly*, 104 F3d 1546, 1556 (CA 10, 1997), which stated that "[a] compact is a form of a contract." Defendants contend that this case supports their proposition that the compacts at issue are nothing more than contracts that could be ratified through resolution. This case is clearly distinguishable, however, where the issue of whether the compacts were legislation was never addressed.

Defendants contend that the Michigan Court of Appeals has also discussed the issue of the constitutionality of the Governor negotiating a State/Tribe compact and reached the same conclusion as in the *Kelly* case. *See Tiger Stadium Fan Club, Inc* v *Governor*, 217 Mich App 439, n 5; 553 NW2d 7 (1996). In *Tiger Stadium*, the Court of Appeals held that revenues received from Indian casinos as a part of a consent judgment between the Governor and an Indian tribe was not State money, thus not subject to the appropriations clause. Defendants contend that the *Tiger Stadium* Court implicitly held that approving State/Tribe compacts by resolution was appropriate where the

Court stated that the Governor did not violate the Separation of Powers Clause by signing the consent judgment and only receiving legislative approval by resolution. The Court of Appeals again discussed this issue in the case of *McCartney* v *Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998). The *McCartney* court held that the Governor had the authority to negotiate State/Tribe compacts so long as he presented the compacts to the Legislature for approval.

There are two critical factors that must be noted about the *Tiger Stadium* and *McCartney* cases. First, neither of these cases involved the issue of whether the compacts constituted legislation, and thus, the statements pertaining this issue are dicta. *Tiger Stadium* involved a claim that money received by the State pursuant to a consent judgment signed by the Governor was subject to the appropriations clause. *McCartney* involved a Michigan Freedom of Information claim where the plaintiff sought documents from the Governor relating to the Governor's negotiations with Indian tribes to enter into compacts. Neither case involved a challenge to the means by which the Legislature approved of compacts entered into by the Governor and Indian tribes for casino gambling.

Second, and most importantly, the *Tiger Stadium* and *McCartney* cases discussed, albeit in dicta, whether the Governor has the authority to negotiate compacts with the Indian tribes and then present the compacts to the Legislature for approval. These cases did not discuss whether the content of the compacts was such that the compacts constituted legislation.[13] In fact, as pointed out

[13]The compacts at issue in *Tiger Stadium* were also passed by concurrent resolution (HCR 439). 1992 Journal of the Senate 2479. This resolution passed in the Senate by a vote of 23 to 13. *Id.* The resolution also passed in the House, but the roll-call was not recorded in the House Journal. To this Court's knowledge, this Legislative act was not challenged with legal action. It is interesting to note, however, that the Sentatorial vote did constitute a majority vote of those elected and serving in the Senate, unlike the resolution at issue in the case at bar.

by the *McCartney* court, "The Governor is constitutionally authorized to present and recommend legislation." *McCartney* at 726 (Citing Const 1963, art 5, § 17). This quote indicates that the Court merely analyzed the issue of whether the Governor had the authority to negotiate the compacts, and left the issue of the process for legislative approval for another day.

Based on the Opinion of the Attorney General and the decisions of the State of Kansas and New Mexico, as well as Michigan and federal law regarding what actions the Legislature may take by resolution versus bill, the Court finds that HCR 115 is legislation.[14] As stated by the United States Supreme Court in the case of *INS* v *Chadha*, 462 US 919, 952; 103 S Ct 2764; 77 L Ed 2d 317 (1983), to determine whether an action is legislative in nature, one must look not to the form, "but upon 'whether they contain matter which is properly to be regarded legislative in its character and effect.'" Therefore, the Court must look beyond the "contract" form of the compact and consider its substance.

"Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice. . . ." *Rodriguez* v *US*, 480 US 522, 526; 107 S Ct 1391; 94 L Ed 2d 533 (1987). There are several aspects of the compacts that have the hallmarks of legislation. Perhaps the most remarkable provision that the State has approved, via the compacts, is that a person of the age of 18 may lawfully engage in casino style-gambling, an act generally prohibited by Michigan law. Section 18 of the Michigan Gaming Control and Revenue Act, being MCL 432.201 *et seq*; MSA ___, makes it a misdemeanor for a person under the age of

[14]Defendant contends that the Opinion of the Attorney General should not be heeded as it is not binding precedent on this Court. The Court recognizes the Opinion of the Attorney General is not binding. While not binding, an opinion of the Attorney General can be persuasive authority. *Indenbaum* v *Michigan Bd of Medicine*, 213 Mich App 263; 539 NW2d 574 (1995).

21 to engage in casino-style gambling. This act excludes from its application gambling on Indian territory. Section 3(2)(d). However, the Court finds instructive that the Legislature has previously made similar policy decisions, e.g. age of a person who may lawfully engage in casino gambling, through Legislation.

Defendants contend that law-making was not required in this case because regulation of Indian gaming has been pre-empted by federal law. *See California* v *Cabazon Band of Mission Indians*, 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987). The *Cabazon* Court also noted, however, that a state, under certain circumstances, may limit the activities of nonmembers on a reservation. 480 US at 215 (Citing *New Mexico* v *Mescalero Apache Tribe*, 462 US 324, 331-332; 103 S Ct 2378, 2385; 76 LE 2d 611 (1983)). In determining whether the state may regulate the activities of nonmemebers, the Court considered "whether state authority is pre-empted by the operation of federal law; and '[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.'" 480 US at 216.

IGRA provides that:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of *criminal law and public policy*, prohibit such gaming activity. [25 USC 2701(5).] [Emphasis added.]

Thus, IGRA does not pre-empt all State authority over gaming on Indian lands. The age restriction found in the Michigan Gaming Control and Revenue Act is a primary example of Michigan's public policy against persons under the age of 21 being permitted to engage in casino-style gambling.

Defendants contend, however, that since the Michigan Gaming Control and Revenue Act expressly permits casino-style gambling, the State has no authority to regulate any casino gambling on Indian land. This Court disagrees. The State of Michigan does not permit casino-style gambling for persons under the age of 21. This is not a regulation of casino gambling in Michigan, but rather a prohibition of this type of gambling for persons under a certain age. This is a policy decision made by the citizens of the State of Michigan that it does not want its' youth influenced by this addictive activity.[15] Therefore, where the Legislature enters a joint resolution permitting a person under the age of 21 to engage in casino gambling on Indian reservations, an activity normally considered criminal under Michigan law, the Legislature is acting on behalf of the citizens in determining the public policy of the State of Michigan. This policy affects all of the citizenry, and thus, may not be passed through resolution, but must be enacted as legislation.

In addition to the age requirement, the compacts also provide for an extensive State regulatory scheme over the casinos. The State, for example, has the right to inspect the casino records and bookkeeping (section 4(M)) and perform background checks on casino employees (section 4(L)). Additionally, section 18(A)(ii) states that the local governments "shall" create a local revenue sharing board to receive and disburse a portion of casino revenues paid to the local governments. Contrary to the State's contention that these local sharing boards are not mandated by the compact and that the local governments are mere third party beneficiaries, the plain language

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[15]The National Gambling Impact Study Commission has warned that lawmakers should take a careful look at the social costs of gambling before increasing its State gaming. Peter Szekely, *Nation Is Urged to Halt Spread of Legal Gambling*, DETROIT FREE PRESS, June 19, 1999. The City of Detroit offers a prime example of gambling's major social cost - addiction. In the past five years, the number of Gamblers Anonymous groups in Detroit has more than tripled. Additionally, there were no certified gambling counselors in Michigan in 1995. Wendy Wendland, *Chronic Gambling Increases in Detroit*, DETROIT FREE PRESS, December 7, 1999. Today, the Director of the Michigan Council on Problem Gambling states that there are more than 200 counselors across the State. *Id.*

of the compact mandates the establishment of these boards. If this Court were to interpreted this provision as a statutory provision, which it is, the Court would be restricted to the clear and unambiguous meaning; that the local governments "shall" establish the local sharing boards - not that they "may" establish the boards. *McKenzie* v *Auto Club Insurance Association*, 458 Mich 214, 217; 580 NW2d 424 (1998) (Citing *Tryc* v *Michigan Veterans' Facility*, 451 Mich 129, 135-136, 545 NW2d 642 (1996).

III. Local Acts

Plaintiffs' next argument is that the compacts are local acts because each compact only allows the construction of casinos in a designated county or counties. Therefore, the Legislature must pass the compacts, in the form of a bill, by a two-thirds vote of the House and Senate and a majority vote of the electorate affected. Defendants respond that since the compacts are not legislation, this constitutional provision does not apply.

Mich Const 1963, art IV, § 29 provides:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

Article IV, § 29 only applies where the Legislature has passed a local act *and where a general act could be made applicable.* Plaintiffs have not argued that a general act could be made applicable. Therefore, this claim is dismissed for lack of merit.

IV. Separation of Powers

Plaintiffs also contend that these compacts violate the Separation of Powers Clause[16] because the Governor has acted to usurp legislative law-making power. The Separation of Powers Clause provides that no person exercising the powers of one branch may exercise the powers of another. *House Speaker* v *Governor*, 443 Mich 560, 586; 506 NW2d 190 (1993). The compacts entered into permit the Governor to amend these compacts without any legislative approval, and thus, the Governor has been given law-making authority pursuant to the terms of the compacts.[17] This clause unconstitutionally grants the Executive branch legislative authority in violation of the Michigan Constitution.

V. Standing - Representative Baird

The Intervening Defendants contend that Representative Baird lacks standing as a Legislator to bring this claim because she has not suffered an injury and/or she has not suffered an injury distinct from the citizenry at large. This claim is without merit, however, where the Michigan Supreme Court held in the case of *House Speaker*, *supra*, that where two of the parties in that case had standing to sue such that the court could adjudicate the claims before it, the court need not address the issue of whether the Senator-plaintiff had standing. *House Speaker* at 573. Therefore, based on *House Speaker*, this Court need not address this issue because the standing of the non-profit corporation has not been challenged.

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[16] Const 1963, art 3, § 2.

[17] The Court notes that it does not make a finding that the Governor may not negotiate a compact and then recommend legislation, undisputedly the Governor has the constitutional authority to do so. Const 1963, art 4, § 17. The Governor does not have the authority, however, to enter into legislation which permits the Governor to unilaterally amend the legislation.

VI. Failure to Join Indispensable Parties

The Intervening Defendants also request that this complaint be dismissed for Plaintiffs' failure to join indispensable parties - the four Indian tribes who are parties to the "contract". MCR 2.205 provides that "necessary parties" must be joined in a lawsuit. A necessary party is a person who has such an interest in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief. MCR 2.205(A). There are four factors to be considered before the court makes a determination to continue without a necessary party:

> (1) whether a valid judgment may be rendered in favor of the plaintiff in the absence of the person not joined;
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> (2) whether the plaintiff would have another effective remedy if the action is dismissed because of the nonjoinder;
>
> (3) the prejudice to the defendant or to the person not joined that may result from the nonjoinder; and
>
> (4) whether the prejudice, if any, may be avoided or lessened by a protective order or a provision included in the final judgment.

The Intervening Defendants contend that since the compacts are a contract, Plaintiffs cannot bring this claim without suing both parties to the contract - the State and the four Indians tribes. And, since the Indians have sovereign immunity and are not subject to suit in state court, this action must be dismissed. *See Huron Potawatomi, Inc* v *Stinger*, 227 Mich App 127; 574 NW2d 706 (1997) (holding that suits against Indian tribes are barred by sovereign immunity absent a clear and unequivocal waiver by the tribe).

Plaintiffs respond that the tribes are not a necessary party where Plaintiffs seek no relief from the tribes and where any interest the tribes have has been preserved by the Intervening Defendants.

Plaintiffs point out that just because a person may have an interest in a case, that does not mean that they must necessarily by joined. Furthermore, this same issue was raised in *State* v *Johnson*, *supra*, and the New Mexico Supreme Court held that the Indians tribes need not be joined where the claim was not for breach of contract and did not require the court to adjudicate the rights and obligations of the parties to the compact.

The question is whether the court can provide complete relief without joining the party. *Hoffman* v *Auto Club Ins Ass'n*, 211 Mich App 55; 535 NW2d 529 (1995). This case is a request for declaratory judgement. The Plaintiffs have asked this Court to determine that the Governor of the State of Michigan does not have the authority to enter into Tribal-State compacts with Indian tribes without Legislative approval. Therefore, the Court can provide complete relief. The Indian tribes are not a necessary party because the rights and obligations sought to be declared are with regards to legislative and gubernatorial authority, not with respect to the compact itself. To the extent that the Indian tribes are a necessary party, however, their interests are protected by the Intervening Defendants. Thus, any prejudice to the Indian tribes is greatly lessened. Moreover, Plaintiffs do not have an adequate remedy at law against the Indian tribes since they are entitled to sovereign immunity.

ORDER

IT IS ORDERED that Plaintiffs' Motion for Summary Disposition is hereby **GRANTED IN PART** and the Michigan Legislature and the Governor have violated Const 1963, art 4, § 22 and Const 1963, art 3, § 2 by approving legislation through means of joint resolution and permitting the Governor to unilaterally amend the legislation.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Disposition is hereby **GRANTED IN PART** and the Michigan Legislature has not violated Const 1963, art 4, § 29.

This case is dismissed in its entirety.

Dated: January 18th, 2000

Peter D. Houk

Hon. Peter D. Houk
Circuit Court Judge

PROOF OF SERVICE

I certify that I mailed a true copy of the above **OPINION AND ORDER** upon all attorneys of record or parties by placing said copy in the first class mail with postage prepaid from Mason, Michigan, on January 18, 2000.

Ann M. Baird

Ann M. Baird
Judicial Assistant

cc: Robert J. Jonker
Eugene Driker
Peter H. Ellsworth
Robert M. Horwitz

A TRUE COPY
CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT